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No. 06-1331

In the

Supreme Court of the United States

GERKE EXCAVATING, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAMIEN M. SCHIFF
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

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INTRODUCTION

In this case, the Seventh Circuit held that Justice Kennedy's jurisdictional test for wetland regulation is controlling under *Rapanos v. United States*, 126 S. Ct. 2208 (2006). That decision had the effect of prohibiting the Army Corps of Engineers from relying on the plurality's jurisdictional test. The government's opposition to this petition is, therefore, curious in light of the fact that the government has consistently maintained throughout this litigation that a proper interpretation of this Court's precedent would allow the exercise of federal jurisdiction based on either the Kennedy test or the plurality test. In fact, the government sought a rehearing of the Seventh Circuit decision in this case asking the court to adopt such a standard and recently the Army Corps of Engineers and the Environmental Protection Agency issued *Rapanos* implementing guidelines authorizing federal regulation of wetlands based on either jurisdictional test. *See* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf (last visited June 13, 2007).

ARGUMENT

The question before this Court is not simply whether the wetlands Gerke filled are jurisdictional under the Clean Water Act, as the government claims. Rather, this Court is called on to act in its primary role as arbiter of the law and resolve a clear and substantial circuit court conflict as to the meaning of this Court's landmark *Rapanos* decision. This conflict requires the Court to decide whether the Army Corps of Engineers may be prohibited from relying on the plurality opinion in *Rapanos* as the Seventh Circuit held in this case, or whether the Corps could choose to rely on the plurality opinion as the First Circuit held in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006). The answer to that question turns on which of the opinions in this Court's split decision is controlling—the four Justice plurality or Justice Kennedy's lone concurrence.

The only rule expressly sanctioned by this Court to interpret its split decisions is found in *Marks v. United States*, 430 U.S. 188 (1977). But the government argues that *Marks* is unworkable as applied to *Rapanos* and that this Court should adopt a new rule for interpreting such decisions. Remarkably, while the government argues *Marks* is unworkable, it opposes a resolution of that question by the Court in this case. Rather than support an effort to settle the law, the government actively seeks to maintain the status quo whereby the lower courts are split on both the application of *Marks* and the enforcement of *Rapanos*.

In *Marks*, this Court stated: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the Judgment[] on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). In contrast to *Marks*, the government contends that the holding of the Court should be viewed as the position taken by *any* majority on the Court, even if that majority includes the dissenting Justices who did not concur in the judgment. But if this Court is to consider the government's proposal to adopt a new interpretive rule, it should do so in the context of a particular case. Therefore, the government's

opposition provides an independent reason for this Court to grant review in this case.[1]

Moreover, the government is wrong. *Rapanos* is a classic *Marks* case. In its opposition, the government acknowledged that the "narrowest grounds" is the concurring opinion that is the logical subset of another opinion concurring in the judgment. Still, the government asserts that the plurality opinion in *Rapanos* is not "in any sense a 'lesser-included' version" of the Kennedy opinion. Opposition at 10. But this is belied by the dissent's observation (with which the government agrees) that it would be "an unlikely event that the plurality's test is met but Justice Kennedy's is not." *Rapanos*, 126 S. Ct. at 2265 n.14. This statement can only be true if the plurality test is a logical subset of the Kennedy test.

According to legal scholars, the "narrowest grounds" standard is met under *Marks* when the "Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule." Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-1604 (1992). "From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same." *Id.* This is certainly true in *Rapanos*. Any wetland that abuts and is indistinguishable from a river, lake, or stream, connected to a navigable-in-fact waterway, as required by the

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[1] The government contends that this case is untimely because the trial court has not yet applied the circuit's legal standard to the facts in the case. But this contention is without merit as the issue raised is purely legal and no additional litigation will benefit the Court. And, it would impose a hardship on Gerke to have to litigate this case once again in trial court and through the appeals process only to return to this Court to resolve an existing circuit split. *See National Park Hospitality Association v. Department of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967).

plurality to establish federal jurisdiction, will necessarily satisfy Justice Kennedy's broad and subjective "significant nexus" test.[2] Thus, whenever jurisdiction is established under the plurality test, all five Justices concurring in the Judgment would support the outcome—the four Justices in the plurality plus Justice Kennedy. In fact, even the four Justices in the dissent would support the outcome: "all four Justices who have joined this [dissenting] opinion would uphold the Corps' jurisdiction . . . in all . . . cases in which either the plurality's or Justice Kennedy's test is satisfied." *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting). Therefore, the plurality test is controlling under *Marks*, not because it is more restrictive of federal power, but because it is clearly a logical subset of Justice Kennedy's concurring opinion.

Nevertheless, the government claims that under *Marks* the "narrowest grounds" must be that position which "would impose the least restrictive limits on the exercise of regulatory authority;" that is, Justice Kennedy's test. Opposition at 14. This is the same interpretation advanced by the Seventh Circuit in this case and which the First Circuit denounced in *Johnson*

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[2] The government claims that the plurality approach would reach wetlands beyond the "significant nexus" test based on Justice Kennedy's suggestion that the plurality test "covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)." *Rapanos*, 126 S. Ct. at 2246. But this is a mischaracterization of the plurality position. The plurality determined the Clean Water Act required limiting federal authority to those "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams[,] . . . oceans, rivers [and] lakes" that are connected to traditional (or navigable-in-fact) waters and only those wetlands abutting these water bodies such that the wetland and the covered water are "indistinguishable." *Id.* at 2225, 2234. In contrast, the Kennedy test places no limits on physical proximity to navigable-in-fact waters and does not even require a hydrological connection to any tributary to a navigable-in-fact water.

thereby creating a conflict necessitating resolution by this Court.

As noted in the petition, the First Circuit in *Johnson* found it inexplicable that the Seventh Circuit in this case equated "narrowest grounds" with the opinion "least restrictive of federal authority." *Johnson*, 467 F.3d at 61. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the *Johnson* court observed that this was mere coincidence and that it "does not necessarily mean that the Supreme Court in *Marks* equated 'narrowest grounds' of decision in a case with fragmented decisions to the grounds least restrictive of the assertion of federal authority." *Id.* at 63. "Such an equation," the court stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Id.* Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.* Thus, the First Circuit expressly rejected the Seventh Circuit's application of *Marks* to the *Rapanos* decision and held that federal jurisdiction could be based on either the plurality test or the Kennedy test. A clearer conflict between two circuits could not be established.

But even if *Marks* did not apply to *Rapanos*, the government's proposed rule would not provide a solution to the problem of determining the controlling opinion in that case. According to the government, a lower court only needs to find five Justices who agree on a standard to determine the controlling rationale of a split opinion. Opposition at 10-11. But this is no help because in *Rapanos*, five or more Justices would uphold federal jurisdiction under either the plurality test

or the Kennedy test. When the Kennedy test is met, five Justices would support the outcome—Justice Kennedy and the four dissenters. When the plurality test is met, all nine Justices would support the outcome—the four Justices in the plurality, the four Justices in the dissent, and Justice Kennedy. Why shouldn't the outcome that has the support of nine Justices take precedence over the outcome that has the support of only five Justices? Obviously, relying on a majority view, as the government advocates, makes no sense when, as in *Rapanos*, there is more than one majority view.

Consequently, there is a real and substantial conflict between the Seventh Circuit decision in this case and the First Circuit decision in *Johnson* as to both *Rapanos* and *Marks*. Whereas the Seventh Circuit held that federal jurisdiction can only be established under the Kennedy "significant nexus" test, the First Circuit held that federal jurisdiction could be established under either the plurality test or the Kennedy test. And, whereas the Seventh Circuit held that *Marks* applied to *Rapanos* but the "narrowest grounds" is the position that is least restrictive of federal authority, the First Circuit held that *Marks* did not apply to *Rapanos* and that the "narrowest grounds" could just as easily mean the position that is most restrictive of federal authority.

CONCLUSION

The Seventh Circuit decision in this case directly conflicts with a decision of the First Circuit and prohibits the Corps of Engineers from relying on the plurality opinion in *Rapanos* that, when applied to find federal jurisdiction over inland wetlands, would have the support of all nine Justices on this Court. Additionally, the circuits are split on the application of *Marks*. These conflicts require resolution by this Court. Inaction will result in continuing uncertainty as to Clean Water Act jurisdiction and undermine the Constitution's safeguards

against arbitrary enforcement of the law. Therefore, the writ of certiorari should be granted.

DATED: June, 2007.

Respectfully submitted,

DAMIEN M. SCHIFF
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner